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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re L.W., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. L.W., Defendant and Appellant.	A145651 (Solano County Super. Ct. No. J41769)

Defendant L.W. appeals from a dispositional order made after the juvenile court found true allegations of a Welfare and Institutions Code section 602 petition alleging he committed first degree burglary and gave false information to a police officer. On appeal, he contends (1) his burglary should be deemed second degree burglary because the court did not state the numerical degree of the offense when sustaining the petition; (2) the court miscalculated his maximum term of confinement; (3) the $166 restitution award is not supported by substantial evidence; (4) the restitution award should include the identity of the victim, and also state defendant and his co-perpetrator are jointly and severally liable; and (5) certain terms of the written dispositional order should be modified so they are consistent with the court's oral pronouncement.

We agree defendant's maximum term of confinement was miscalculated and should be reduced, though not as much as he contends. We also make certain

modifications to the written dispositional order so it is consistent with the oral pronouncement. As modified, we affirm.

BACKGROUND

Defendant has been involved with the juvenile justice system since at least April 2012. In May 2015, the district attorney filed a Welfare and Institutions Code section 602, subdivision (a), petition charging him with first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a)) and giving false information to a police officer (Pen. Code, § 148.9, subd. (a)).

The evidence presented at the jurisdictional hearing established the following: Defendant was seen in front of a duplex in Vallejo on the night of May 2, 2015. Defendant then walked toward a gate alongside the duplex that led to the backyard. Later that night, he was seen leaving the duplex with his younger brother. One of them was carrying a flat-screen television. Upon being spotted, the two ran across the street, leaving the television behind. A short time later, police found defendant and his brother in a yard across the street. Both gave false names to police. When the person residing in the duplex returned home, she noticed $100 was missing from her wallet (it is unclear from her testimony whether her wallet was taken).

The juvenile court found the allegations to be true beyond a reasonable doubt.

At the dispositional hearing, the court committed defendant to the probation officer for out-of-home placement, with a maximum term of confinement of six years six months. It also awarded $166 in victim restitution.

DISCUSSION

Degree of Burglary Offense

Defendant contends his burglary offense should be deemed second degree burglary because the juvenile court did not specify the numerical degree at either the jurisdictional or dispositional hearing.

At the conclusion of the jurisdictional hearing, the court stated, "When you add up all the other evidence along with it together, I find that they have been identified as the

right minors as charged." At the dispositional hearing, the court stated "[t]he petition's deemed a felony as to Count One."

Penal Code section 1192 provides: "[U]pon conviction by the court without a jury, of a crime or attempted crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree. Upon the failure of the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

California Rules of Court, rule 5.780(e)(5),[1] similarly provides that in a juvenile delinquency matter, the court "must make findings on . . . [¶] . . . the degree of the offense and whether it would be a misdemeanor or a felony had the offense been committed by an adult." This rule is satisfied if "at the end of the jurisdiction hearing, or during the disposition hearing, the court makes a finding as to the degree of the crime either by numerical designation or a sufficiently clear description of the offense. [Citation.]" (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 581 (*Andrew I*).) There is no requirement that the court "repeat some ancient magical incantation." (*Id.* at p. 580.)

Here, the juvenile court's express finding at the conclusion of the jurisdictional hearing—that defendant was identified "as charged"—is an adequate description of the offense, since count 1 of the petition specifically alleged "L[.W.] did commit a felony namely: FIRST DEGREE RESIDENTIAL BURGLARY, a violation of Section 459 of the Penal Code of the State of California." There was, in short, no risk to defendant the degree of his crime would be increased after judgment, the risk against which Penal Code section 1192 and rule 5.780(e)(5), are meant to protect. (*Andrew I., supra,* 230 Cal.App.3d at p. 581.)

Defendant's reliance on *In re Jacob M.* (1987) 195 Cal.App.3d 58, is misplaced. There, the appellate court deemed a burglary finding to be of second degree burglary because the juvenile court did not explicitly state the numerical degree of the offense. (*Id.* at p. 65.) However, the same court repudiated the case four years later in *Andrew I.*

[1] All further rule references are to the California Rules of Court unless otherwise indicated.

Agreeing with another court that had criticized *Jacob M.*, the court in *Andrew I.* characterized its analysis in *Jacob M.* as "illogical" and held "the requirement of a finding as to the degree of the crime can be satisfied by using a descriptive label as well as by a numerical degree." (*Andrew I, supra,* 230 Cal.App.3d at p. 581, citing *People v. Goodwin* (1988) 202 Cal.App.3d 940, 947; accord, *In re Raymond M.* (1991) 228 Cal.App.3d 1508, 1512–1513.) Accordingly, as has every other appellate court to consider the issue, we agree a juvenile court need not explicitly state the numerical degree of an offense so long as its findings sufficiently establish the degree.

Maximum Term of Confinement

The juvenile court appears to have calculated the maximum term of confinement by combining the six-year maximum term for first degree burglary (Pen. Code, § 461, subd. (a)) with the six-month term for giving false information to police (Pen. Code, §§ 19, 148.9, subd. (a)). Defendant maintains the juvenile court erred in doing so.

Recycling his assertion that his burglary offense should be deemed second degree burglary, he first contends the juvenile court should have used the three-year maximum term for second degree burglary, instead of the six-year maximum term for first degree burglary. Since we have rejected defendant's underlying premise, we likewise reject his contention that the three-year, rather than the six-year, maximum term should apply.

Defendant next contends that as to the giving false information offense, the juvenile court should have used one-third the full term, which is two months, instead of the full term of six months. The Attorney General agrees, as do we. (See *In re Eric J.* (1979) 25 Cal.3d 522, 537–538 [maximum term is calculated by taking the upper term for principal offense and adding one-third the full term for misdemeanors].) We therefore order defendant's maximum term of confinement reduced from six years six months to six years two months.

The Restitution Award

Amount of Restitution

Defendant first challenges the $166 restitution award on the ground it is not supported by substantial evidence. The Attorney General maintains defendant has

forfeited this challenge because he never took issue with the award during the juvenile court proceedings.

In *People v. Brasure* (2008) 42 Cal.4th 1037, 1074–1075 (*Brasure*), the Supreme Court directly addressed the issue of forfeiture in the context of victim restitution. In that case, the defendant challenged a restitution order on the ground the victim's loss "was not shown by documentation or sworn testimony." In holding the defendant had not preserved the contention for appeal, the high court stated: "[B]y his failure to object, defendant forfeited any claim that the order was merely unwarranted by the evidence, as distinct from being unauthorized by statute. [Citation.] As the order for restitution was within the sentencing court's statutory authority, and defendant neither raised an objection to the amount of the order nor requested a hearing to determine it [citation], we do not decide whether the court abused its discretion in determining the amount." (*Id*. at p. 1075.) Here, too, defendant neither objected to the restitution award nor requested a hearing on the matter. Accordingly, under *Brasure*, he has forfeited his sufficiency-of-the-evidence challenge to the restitution award.

The Supreme Court also examined the forfeiture doctrine in the sentencing context in a recent trilogy of cases—*People v. McCullough* (2013) 56 Cal.4th 589, 597 (*McCullough*) (holding forfeiture rule applies to jail booking fees), *People v. Trujillo* (2015) 60 Cal.4th 850, 853 (*Trujillo*) (holding forfeiture rule applies to probation supervision fees and presentence investigation fees), and *People v. Aguilar* (2015) 60 Cal.4th 862, 864 (*Aguilar*) (holding forfeiture rule applies to probation fees and reimbursement of attorney fees).

In *McCullough*, the defendant argued the evidence did not establish he had the ability to pay a $270.17 jail booking fee. (*McCullough*, *supra*, 56 Cal.4th at pp. 590–591.) While the high court agreed he had a statutory right to a determination of his ability to pay, the court nevertheless held he had forfeited his challenge to the sufficiency of the evidence to support the fee because he did not object when the trial court imposed it. (*Id*. at pp. 591–593.) The court specifically rejected the defendant's assertion that "his challenge [came] within the general rule that ' "a judgment . . . not supported by

substantial evidence" ' may be challenged for the first time on appeal" (*id*. at p. 593) and the court should "simply '. . . follow [its decision in] *Butler*, ' " where the court had allowed a challenge to a compelled DNA sample for the first time on appeal. (*Id*. at p. 596, citing *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*).)

The court distinguished *Butler*. "[T]he issue presented in *Butler* extended beyond mere disagreement over the import of certain facts" because " '[p]robable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.' " (*McCullough, supra*, 56 Cal.4th at p. 595.) The "defendant's ability to pay the booking fee," in *McCullough*, however, did "not present a question of law in the same manner as does a finding of probable cause." (*Id.* at p. 597.) "Defendant may not," said the court, " 'transform . . . a factual claim into a legal one by asserting the record's deficiency as a legal error.' [Citation.] By 'failing to object on the basis of his [ability] to pay,' defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]." (*Ibid.*) The court thus held "that because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*Ibid.*)

A restitution award, like the booking fee at issue in *McCullough*, is "confined to factual determinations." (*McCullough, supra*, 56 Cal.4th at p. 597.) Therefore, *McCullough* reinforces *Brasure*'s conclusion that failure to object to a restitution award foreclosed a sufficiency-of-the-evidence challenge for the first time on appeal.

Defendant contends *McCullough* is inapplicable, arguing the Supreme Court "differentiated between a booking fee, the imposition of which is not subject to any procedural safeguards and which the Court characterized as de minimis, and other fees, for which a defendant is entitled to procedural safeguards, and which are clearly not de minimis." However, *McCullough* does not hold the forfeiture rule applies only to de minimis fees not subject to procedural safeguards; rather, the court stated "the rationale

for forfeiture is particularly strong" under those circumstances. (*McCullough, supra*, 56 Cal.4th at p. 599.) Furthermore, in *Trujillo*, the high court made clear the forfeiture rule can apply even where a fee is assessed under a statute with procedural requirements. (*Trujillo, supra*, 60 Cal.4th at p. 858.)

Defendant also relies on *In re Travis J.* (2013) 222 Cal.App.4th 187 (*Travis J.*), where our colleagues entertained a challenge to a restitution order, relying on the general rule that sufficiency of the evidence challenges are not waived. (*Id.* at p. 203.) The appellate court, however, made no mention of either *Brasure* or *McCullough.* Nor did it have the benefit of the Supreme Court's subsequent decisions in *Trujillo* and *Aguliar.* Rather, *Travis J.* relied on *In re K.F.* (2009) 173 Cal.App.4th 655. (*Travis J., supra*, 222 Cal.App.4th at pp. 202–203.) Not only was *In re K.F.* decided well before *McCullough*, but the appellate court concluded the Supreme Court had not really meant what it said in *Brasure* and subsequently made clear in *Butler* that sufficiency of the evidence arguments are never waived. (*In re K.F., supra*, 173 Cal.App.4th at pp. 660–661.) However, as we have discussed, in *McCullough*, the high court distinguished *Butler* as dealing with a legal defect rather than merely a sufficiency of the evidence problem. (*McCullough, supra*, 56 Cal.4th at pp. 596–597.) We are, of course, bound by Supreme Court authority, and given the further development of the forfeiture doctrine in the context of sentencing in *McCullough, Trujillo,* and *Aguilar*, we conclude *Travis J.* no longer reflects the current state of the law.

We therefore conclude defendant, having failed to make any objection in the juvenile proceedings, has forfeited his challenge to the amount of restitution awarded.

Other Challenges to the Award

Defendant asserts the juvenile court also erred by not identifying the victim and not making his restitution liability joint and several with that of his brother. Defendant has also forfeited these issues on appeal, since he did not advance either in the juvenile proceedings. (See *McCullough, supra*, 56 Cal.4th at p. 597; *People v. Scott* (1994) 9 Cal.4th 331, 356.)

In any case, both contentions lack merit and defendant cannot show any abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663–664 & fn. 7 [restitution order reviewed for abuse of discretion].) Although a restitution order should generally "identify each victim," (Welf. & Inst. Code, § 730.6, subd. (h)(1)), there is only one victim in this case, which leaves no ambiguity about who should receive the ordered restitution. As to being a joint and several liability, defendant cites no authority that it is required. Even if it is sometimes, or even often, the case, "joint and several liability may not be preferable in all cases involving codefendants." (*People v. Zito* (1992) 8 Cal.App.4th 736, 745.) Defendant has offered no explanation why, under the circumstances of this case, the juvenile court abused its discretion in choosing not to make the restitution order joint and several.

Inconsistencies Between Oral and Written Orders

Defendant lastly contends there are inconsistencies between the juvenile court's oral pronouncement at the dispositional hearing and its subsequent written order, and the written order must therefore be modified.

He first points out the juvenile court orally stated he could earn "1 hour per C [grade]" and "hour for hour credit for counseling" toward volunteer work requirements, but the written order contains no such terms. The Attorney General agrees this is a material omission and the written order should be modified to include these terms. We agree, as well, and will order the order modified accordingly. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185–186 [appellate court has inherent power to correct clerical errors in the record so it is consistent with oral pronouncement].)

Defendant next objects the written order provides that " '[a]ll previous orders not in conflict with the present order to remain in full force and effect,' " but the juvenile court never made such a statement in open court. We do not view this proviso of the written dispositional order as being inconsistent with the juvenile court's oral disposition. Rather, the provision simply insures consistency with prior rulings. (Cf. *People v. Smith* (1983) 33 Cal.3d 596, 599 [apparent conflicts in record are to be harmonized, if possible]*; In re Byron B.* (2004) 119 Cal.App.4th 1013, 1018 [clerk's minutes' inclusion

of knowledge requirement for probation condition was consistent with reporter's transcript because "clerk's transcript simply clarifies a point that the reporter's transcript left ambiguous"].)

DISPOSITION

Defendant's maximum term of confinement is reduced from six years six months to six years two months.

The written dispositional order is modified to state that defendant receives "1 hour per C" and "hour for hour credit for counseling" toward his volunteer work requirement.

As modified, the juvenile court's dispositional order is affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.